Supreme Court, U.S.
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No. 03-298

In the Supreme Court of the United States

DWIGHT B. LEWIS, PETITIONER

v.

T.C. PETERSON, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a federal inmate who was barred from filing a second or successive motion under 28 U.S.C. 2255 to challenge his conviction for using a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c), under *Bailey* v. *United States*, 516 U.S. 137 (1995), is entitled to relief under 28 U.S.C. 2241 in the absence of a showing that he is actually innocent on a Section 924(c) count carrying an equal penalty that was dismissed as a result of a plea agreement.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Bailey v. *United States*, 516 U.S. 137 (1995)	2, 3
Bousley v. *Brooks*, 97 F.3d 284 (8th Cir. 1996), rev'd, 523 U.S. 614 (1998)	3
Bousley v. *United States*, 523 U.S. 614 (1998)	2, 4, 7, 8
Dorsainvil, In re, 119 F.3d 245 (3d Cir. 1997)	5
Murray v. *Carrier*, 477 U.S. 478 (1986)	4
Reyes-Requena v. *United States*, 243 F.3d 893 (5th Cir. 2001)	5
United States v. *Barrett*, 178 F.3d 34 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000)	5
United States v. *Johnson*, 260 F.3d 919 (8th Cir. 2001)	6, 9, 10

Statutes:

18 U.S.C. 924(c)	*passim*
18 U.S.C. 924(c)(1)	9
21 U.S.C. 841(a)(1)	1, 3
28 U.S.C. 2241	2, 4
28 U.S.C. 2255	2, 3, 4, 5, 9

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 329 F.3d 934.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 2003. The petition for a writ of certiorari was filed on August 21, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entry of a guilty plea in the United States District Court for the District of Nebraska, petitioner was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 3), and using a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)

(Count 4). He was sentenced to 140 months of imprisonment on Count 3, and to a mandatory consecutive 60-month term of imprisonment on Count 4. Petitioner did not timely appeal his convictions.

Petitioner subsequently brought a motion under 28 U.S.C. 2255 challenging his firearm conviction under this Court's decision in *Bailey* v. *United States*, 516 U.S. 137 (1995), which was rendered shortly after he had been convicted. The district court denied his motion, and the court of appeals denied petitioner a certificate of appealability. Following this Court's decision in *Bousley* v. *United States*, 523 U.S. 614 (1998), petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2241 in the United States District Court for the Central District of Illinois challenging his Section 924(c) conviction. On July 12, 2000, the district court denied the petition (Pet. App. 8-17), and the court of appeals affirmed. *Id.* at 1-5.

1. On May 14, 1994, petitioner and a female companion were engaging in sexual conduct while parked in the driveway of a construction site where petitioner was working. A police officer pulled up and asked them to step out of the car. The officer searched the car and found a .357 magnum revolver in the back passenger seat and cocaine in the trunk of the car.

On July 28, 1994, petitioner was arrested at his Omaha, Nebraska residence. Gov't C.A. Br. 3. The police recovered a .380 semiautomatic pistol in the bedroom and 63 grams of cocaine just outside the residence. On September 19, 1994, petitioner was arrested in possession of 3.5 grams of crack cocaine. On October 30, 1994, petitioner was arrested in possession of 10.17 grams of crack cocaine. Pet. 4.

A grand jury sitting in the District of Nevada returned an indictment that charged petitioner with

possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 1); three counts of possession of crack cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 3, 5 and 6); and two counts of using and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c) (Counts 2 and 4). The firearm offense charged in Count 2 was based on the events of May 14, 1994, and the firearm offense charged in Count 4 was based on the events of July 28, 1994. Pursuant to a plea agreement, petitioner entered pleas of guilty to Counts 3 and 4 of the indictment in return for the dismissal of the remaining counts. He was sentenced to 140 months of imprisonment on Count 3, and to a consecutive five-year term of imprisonment on Count 4. Petitioner did not timely appeal his convictions. Gov't C.A. Br. 4.

2. Several months after his convictions, this Court held in *Bailey* v. *United States*, 516 U.S. 137 (1995), that a conviction for use of a firearm under Section 924(c) "requires evidence sufficient to show an *active employment* of the firearm by the defendant." *Id.* at 143. Shortly thereafter, petitioner unsuccessfully sought leave to pursue a late appeal. Pet. App. 9. On October 15, 1996, petitioner filed a petition for post-conviction relief pursuant to 28 U.S.C. 2255, arguing that *Bailey* mandated that his firearm conviction (Count 4) be vacated. Relying on *Bousley* v. *Brooks*, 97 F.3d 284 (8th Cir. 1996), the district court denied the petition, ruling that petitioner had procedurally defaulted the claim by failing to raise it on direct appeal. The court of appeals denied petitioner a certificate of appealability. Pet. App. 1-2; Gov't C.A. Br. 5-6.

On May 18, 1998, this Court reversed the Eighth Circuit's decision in *Bousley*, holding that *Bailey* applied

retroactively to cases on collateral review. *Bousley* v. *United States*, 523 U.S. 614 (1998). The Court held in *Bousley* that a defendant could collaterally attack under Section 2255 a plea-based Section 924(c) conviction if he could demonstrate that a procedurally defaulted constitutional error in his plea colloquy "has probably resulted in the conviction of one who is actually innocent." *Id.* at 623 (quoting *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986)). In describing the extent of a prisoner's burden in establishing his actual innocence, the Court stated: "In cases where the Government has forgone more serious charges in the course of plea bargaining, [a] petitioner's showing of actual innocence must also extend to those charges." *Id.* at 624.

3. On March 13, 2000, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2241 in the United States District Court for the Central District of Illinois, the district of his incarceration. The Section 2241 petition challenged petitioner's Section 924(c) conviction on the ground that the conduct underlying that conviction did not amount to the requisite "use" of a firearm as contemplated by *Bailey*. Gov't C.A. Br. 6-8. Under 28 U.S.C. 2255, a court may entertain a habeas petition under Section 2241 if "it appears * * * that the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." The district court assumed that Section 2241 relief was available to petitioner because the remedy provided in Section 2255 was inadequate or ineffective to test the validity of petitioner's conviction. Pet. App. 9-12. Reaching the merits, the court denied the petition on the ground that petitioner, although establishing his innocence on the Section 924(c) to which he pleaded guilty, had failed to show that he was

actually innocent of the Section 924(c) offense (Count 2) that was dismissed as part of his plea agreement. The court explained that the facts underlying Count 2 constituted a valid "carrying" of a firearm during the course of and in relation to a drug trafficking offense. *Id.* at 12-16; Gov't C.A. Br. 8-9.

4. The court of appeals affirmed. Pet. App. 1-5. The court found, as the government had conceded (Gov't C.A. Br. 13-16), that petitioner was entitled to proceed by way of habeas corpus. The court reasoned that Section 2255 relief was inadequate in this case because "petitioner could not have satisfied the criteria for filing a second section 2255 motion because he was not seeking relief on the basis of newly discovered evidence or a new rule of constitutional law, which are the only grounds for a second such motion." Pet. App. 3. The court found that because the combined effect of *Bailey* and *Bousley* was "to establish that [petitioner] was convicted of a nonexistent crime" (which was a ground for collateral relief), and because the Section 2255 route was barred, "[petitioner] was entitled to proceed by way of habeas corpus." *Ibid.*[*]

The court of appeals affirmed the district court's denial of habeas corpus relief, however, because petitioner had failed to establish his actual innocence on the Section 924(c) count that had been dismissed pursuant to the plea agreement. The court rejected petitioner's claim that, under *Bousley*, petitioner did not have to

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[*] Other courts have similarly held that in limited situations such as those presented here, a prisoner is entitled to proceed by way of habeas corpus. See, *e.g.*, *Reyes-Requena* v. *United States*, 243 F.3d 893, 903 (5th Cir. 2001); *United States* v. *Barrett*, 178 F.3d 34, 51-52 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000); *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997).

establish his innocence on the dismissed Section 924(c) charge because it was not "more serious" than the Section 924(c) count to which he pleaded guilty. Pet. App. 4-5. The Court found that the logic of *Bousley* "does not support limiting [its rule] to the case in which the dropped or otherwise forgone charge was more serious, rather than as or more serious, than the charge to which [petitioner] pleaded guilty." *Id.* at 5. The court explained:

> For if it is as serious, the petitioner would have gained little or nothing had the government and he realized that the charge to which he pleaded guilty was unsound. Had they realized this they would have switched the plea to the sound charge, and as long as it was an equally serious charge, as it was here, the punishment would probably have been the same * * *. [O]nly if [the dropped charge] charges a less serious crime is there a strong reason to believe that the defendant was punished more severely by virtue of having pleaded guilty to the count later learned to be invalid.

Id. at 4-5.

ARGUMENT

Petitioner contends (Pet. 8-11) that the court of appeals' decision conflicts with the decision of the Eighth Circuit in *United States* v. *Johnson*, 260 F.3d 919 (2001) (per curiam), on the question whether a prisoner who collaterally attacks a plea-based Section 924(c) conviction must establish his actual innocence of a dismissed Section 924(c) charge that would not have carried a longer sentence than the challenged Section 924(c) count. Although the decision below reached a different result than *Johnson* based on similar facts,

there is no square conflict between the two decisions that would warrant this Court's plenary review.

1. In *Bousley*, this Court held that a defendant who pleaded guilty to a Section 924(c) charge before *Bailey* may raise a collateral claim that the plea was entered without a correct understanding of the elements of the offense, notwithstanding his procedural default of that claim, if he could make an adequate showing of actual innocence. In describing the extent of a prisoner's burden in establishing his actual innocence, the Court stated: "In cases where the Government has forgone more serious charges in the course of plea bargaining, [a] petitioner's showing of actual innocence must also extend to those charges." 523 U.S. at 624.

The court of appeals in this case correctly applied *Bousley* to require petitioner to establish his actual innocence on the Section 924(c) charge that the government dismissed in exchange for petitioner's guilty plea to the invalid Section 924(c) charge. Petitioner has failed to show his actual innocence of the Section 924(c) count that the government dropped in its plea agreement. Pet. App. 4, 16. Petitioner accordingly should not be relieved from his procedural default and permitted to challenge the Section 924(c) count to which he pleaded guilty. Had the government known about *Bailey* at the time of petitioner's guilty plea, or had petitioner raised a *Bailey*-type objection at the time, the government could have requested petitioner to plead guilty to the forgone count as to which there was adequate evidence, or the government could have proceeded to trial on that count. As the court of appeals explained, if a forgone count in such situations is an equally serious charge, the punishment probably would have been the same. "[O]nly if [a dropped charge is] a less serious crime is there a strong reason to

believe that [a] defendant was punished more severely by virtue of having pleaded guilty to the count later learned to be invalid." *Id.* at 5. In short, petitioner should not be allowed to raise a procedurally defaulted challenge to a Section 924(c) sentence that he bargained for when he actually committed a Section 924(c) offense that most likely would have resulted in the same punishment had it not been dismissed in exchange for his plea.

Bousley itself contemplated that a defendant collaterally attacking a Section 924(c) conviction would not only have to establish his innocence on that offense, but also on any other charge that might have resulted in equal or greater punishment that the government had forgone during plea negotiations. The Court there rejected the contention that the defendant was required to show not only that he was actually innocent of "using" a firearm—the conduct with which he was charged—but also actually innocent of "carrying" a firearm:

> [T]here is no record evidence that the Government elected not to charge [defendant] with "carrying" a firearm in exchange for his plea of guilty. Accordingly, petitioner need demonstrate no more than that he did not "use" a firearm as that term is defined in *Bailey*.

523 U.S. at 624. That language clearly contemplates that if the government forgoes a valid "carry" charge in favor of an invalid "use" charge, a defendant should have to establish his innocence on the carry charge—an offense as serious as, but not more serious than the use charge—in order to obtain relief.

2. The court of appeals' decision does not squarely conflict with the Eighth Circuit's per curiam decision in

Johnson. In that case, the defendant pleaded guilty to a Section 924(c) count based on the theory later rejected in *Bailey* partly in exchange for the dismissal of another Section 924(c) count. Following *Bailey*, the defendant moved under 28 U.S.C. 2255 to vacate his Section 924(c) conviction. The district court denied the motion, and the court of appeals remanded for further consideration in light of *Bousley*. After the district court granted the motion without holding an evidentiary hearing, the court of appeals again remanded for an evidentiary hearing to determine whether the dismissed Section 924(c) charge was more serious than the one to which the defendant had pleaded guilty.

On remand, the district court found that the dismissed Section 924(c) was not more serious than the one to which defendant had pleaded guilty. In affirming, the Eighth Circuit rejected the specific argument advanced by the government that the dismissed Section 924(c) was *more* serious than the one to which the defendant pleaded guilty because a "second or subsequent" Section 924(c) conviction was punishable by a mandatory 20-year consecutive term of imprisonment (18 U.S.C. 924(c)(1)). The court explained that, "[e]ven if one [Section] 924(c) charge can be more serious than another [Section] 924(c) charge, the dismissed charge in [the defendant's] case related to earlier conduct, and thus, could not have received the enhanced penalty for a 'second or subsequent' gun conviction." 260 F.3d at 921.

The decision below interpreted the Eighth Circuit's decision as not requiring a defendant to show his actual innocence on a dismissed Section 924(c) charge that is *as* serious as the invalid count. Pet. App. 4-5. The Eighth Circuit in *Johnson*, however, did not address the precise question resolved by the court of appeals in

this case, *i.e.*, whether a forgone count carrying a penalty of *equal* severity to an invalidated count should be treated in the same manner as a "more serious" offense of which the defendant must show his actual innocence. The Eighth Circuit expressly did not decide whether for purposes of *Bousley* "one [Section] 924(c) charge can be more serious than another [Section] 924 charge," 260 F.3d at 921, and held only that the forgone Section 924(c) count in that case was not "more serious." Because *Bailey*-based collateral challenges to Section 924(c) convictions are a limited and diminishing class, the issue may not arise in the future (and thus would lack the prospective importance needed to warrant this Court's attention). But if the Eighth Circuit does address the precise issue addressed below, it may well be influenced by the reasoning of the Seventh Circuit in this case. Accordingly, review by this Court at the present time is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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